No. 95-1008

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

HEWLETT-PACKARD COMPANY,

Petitioner,

vs.

DATAGATE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RUEL WALKER
AW OFFICES OF
UEL WALKER
44 Montgomery, Suite 2500
San Francisco, California 94104
(415) 397-1578

FRANCIS O. SCARPULLA
Counsel of Record
LAW OFFICES OF
FRANCIS O. SCARPULLA
The Alcoa Building
One Maritime Plaza, Suite 1040
San Francisco, California 94111
(415) 788-7210

Attorneys for Respondent

8355
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

25 pp

QUESTIONS PRESENTED

1. Is there sufficient evidence of a coerced agreement in restraint of trade in violation of Section 1 of the Sherman Act when the record demonstrates that Hewlett Packard's tying policy forced Rockwell International (1) to transfer a service contract from Datagate back to HewlettPackard, less than a year after Rockwell had chosen Datagate and rejected Hewlett-Packard for the same contract because of Datagate's lower prices, and (2) to renew a different service contract with Hewlett-Packard even though Rockwell was unhappy with Hewlett-Packard's service and would have preferred to take advantage of Datagate's lower prices and better service?

2. When an antitrust plaintiff has demonstrated the imposition of a tie-in between two distinct products by a defendant with undisputed market power in the tying product, resulting in foreclosure of a volume of commerce that is "substantial" under the standards applied in all prior tying cases, should a federal forum be denied on the grounds that the plaintiff has been able to show the coercion of only a "single purchaser," pursuant to one sentence of dictum in this Court's opinion in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16 (1984)?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the petition identifies all parties in the court of appeals. Respondent Datagate, Inc. has no parent corporation and no subsidiary corporations.

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OPINIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

Respondent accepts petitioner's statement of the opinions below, statement of jurisdiction, and statement of the statutes involved.

COUNTER-STATEMENT OF THE CASE

The Ninth Circuit opinion in this case commented that, during the course of the appeal, Hewlett-Packard Company ("HP") had engaged in "persistent attempts to obfuscate the applicable legal standards." (Petitioner's Appendix [hereafter, "Pet. App."] at 15a). HP has continued this tactic in this petition by failing to discuss many of the underlying facts in the record that support the conclusions of the Ninth Circuit. An accurate and complete statement of the case demonstrates that HP's arguments are not supported by the record.

A. Hewlett-Packard's Actions Against Independent Service Organizations.

HP manufactures and services computer systems. After the expiration of the initial warranty period on its computers, HP sells annual service contracts for continuing maintenance for the computer system's hardware and software.

Respondent Datagate, Inc. ("Datagate") believed that HP's prices for computer hardware maintenance and support were unjustifiably high, and that HP did not meet its customers' needs in several important respects. Datagate entered competition with HP for a very specific and limited market niche, the maintenance and support of the hardware in HP "minicomputers," a mid-size computer system about as large as a speaker's lectern. Contrary to several statements in the petition, the market relevant to this

litigation is not hardware service for all HP computer systems, but only hardware service for HP minicomputers. (Appellant's Excerpts of Record [hereafter, "ER"] at 188).

Datagate was by far the largest of several "independent service organizations" ("ISOs") competing with HP for the hardware maintenance and support of HP's own minicomputers. Datagate was able to offer hardware maintenance and support service for HP minicomputers at prices significantly below HP's prices for similar service. (ER at 167).

Datagate and the other, smaller, ISOs were not able to offer maintenance and support service for HP's operating systems software, which depended upon HP's proprietary materials. Thus, HP had a virtual monopoly in the market for software maintenance and service for its computers. Software service was absolutely essential for owners of HP minicomputers, for the simple reason that computers will not function properly if the operating system software has a defect. HP indisputably had market power in the market for its software maintenance and support, and HP so stipulated for the purposes of the motion for summary judgment relevant to this petition. (ER at 188).

Responding to the increasingly successful competition from Datagate and a few other ISOs, HP developed and implemented a market plan to stem this competitive threat. HP planned to deny the ISOs access to HP parts, updates on operating systems software, hot-line service for faster parts delivery, and cost-saving assembly parts-exchange programs, to mention only a few of the many restrictions that HP imposed.

Datagate alleges that HP also engaged in other illegal and anticompetitive practices aimed particularly at Datagate, including the imposition of tying arrangements. One HP

employee, David Carver, gave deposition testimony that he had overheard or participated in discussions of HP imposing such tie-ins on customers, although he could not remember the names of the customers.[1] (Brief of Appellant at 28-34). Datagate also had evidence of numerous other specific tie-ins, (*id.* at 8-9), although this evidence was ultimately excluded as being hearsay. (Pet. App. at 20a-22a).

But Datagate had unequivocal and admissible evidence that HP imposed a tie-in on Rockwell International in Dallas, Texas ("Rockwell"). Originally, all of Rockwell's contracts for service of its HP minicomputers were with HP, but in 1984 Rockwell removed the contract for maintenance of the HP "1000 series" minicomputers and gave that service contract to Datagate instead. (ER at 98-99, 109). Rockwell was initially motivated by the fact that Datagate offered significantly lower prices than HP. (ER at 99). Rockwell was pleased with Datagate's service. (ER at 109).

In mid-1985, Datagate approached Robert Buckner of Rockwell, who was in charge of maintenance of a separate line of computers known as the HP "3000 series," and offered to bid on Rockwell's next contract for maintenance of this much larger system. (ER at 108). Mr. Buckner had a vague recollection of having heard that HP would not maintain the software unless it also had the hardware maintenance contract as well. (ER at 110). Therefore, he called Paul Voelker, HP's account representative for Rockwell. Mr. Voelker told Mr. Buckner that "it was his

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1. HP disputed that the Carver deposition was subject to this interpretation. The district court interpreted the deposition contrary to Datagate's position, holding that it did not offer evidence of additional tying arrangements. (Pet. App. at 20a-21a). On appeal, the Ninth Circuit did not reach the issue of whether the district court properly interpreted the Carver deposition. (Pet. App. at 15a, note 2).

understanding that HP would not support the software unless they supported the hardware." (ER at 118).

Mr. Voelker referred Mr. Buckner to Gene Hair, HP's district manager for software maintenance. (ER at 113-114). Mr. Buckner called Mr. Hair, who confirmed that HP had this tying policy. (ER at 107, 114-115). Mr. Hair said that he would call someone at HP's headquarters in California to confirm the company's position. When Mr. Buckner called back a second time, Mr. Hair confirmed that HP would not sell software support to a customer that did not purchase hardware support as well. (ER at 115, 118-119).

Knowing that it could not function without software maintenance and support from HP, (ER 112-113), Rockwell decided that it could not use Datagate for the HP "3000 series" service contract, even though Datagate was otherwise qualified for the contract and offered significantly lower prices, and even though Rockwell had been happy with Datagate's service and unhappy with HP's service. (ER 100-101, 109-110, 123). Instead, Rockwell gave the contract for service of the 3000 series to HP. (ER 123). Rockwell also canceled Datagate's existing "1000 series" service contract, which was taken from Datagate and returned to HP.[2] Datagate's officers testified that the HP 1000 series contract alone was worth approximately $100,000 a year. Rockwell told Datagate that the reason for the cancellation was HP's tying policy. (ER at 168).

Approximately one year later, in October 1986, Mr.

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2. Thus, the petition is misleading when it states that "Datagate never submitted a bid for the contract at issue . . . ." (Petition at 4). Datagate had actually been awarded one of the two contracts at that time, the 1000 series contract, but that contract was canceled and returned to HP. Datagate was foreclosed from bidding on the second contract, the 3000 series contract, by HP's tying policy.

Buckner was at a meeting with Doug Spreng, the general manager of HP's business computer division. Mr. Buckner asked Mr. Spreng if HP tied the purchase of hardware service to the purchase of software service, and Mr. Spreng said that it did not. When Mr. Buckner told Mr. Spreng that "he should inform the local field offices of that policy, because we had gotten some information to the contrary at the local level," Mr. Spreng did not inquire who had told Rockwell of this policy. (Appellee's Supplemental Excerpts of Record at 8-9).

During the entire history of this litigation, HP has never attempted to offer evidence that these conversations with Rockwell did not take place or that they were misinterpreted by Rockwell. Nor has HP ever offered evidence that its employees had been mistaken about HP's policies.

B. The Course of Proceedings Below.

Datagate's second amended complaint stated the following causes of action: (1) a violation of section four of the Clayton Act based on alleged violations of section two of the Sherman Act, for monopolization and attempted monopolization; (2) a violation of section one of the Sherman Act, based on illegal tying arrangements; (3) injunctive relief under section 16 of the Clayton Act; and (4) other relief in relation to pendent state law claims.

In September 1986, before there was any discovery on the illegal tie-in claim, the United States District Court for the Northern District of California, the Honorable Robert P. Aguilar presiding, dismissed the tie-in claim under Rule 12(b)(6), Fed. R. Civ. P., pursuant to HP's motion. The district court subsequently granted summary judgment on all remaining federal antitrust claims and dismissed the pendent state claims. The pendent state claims were then asserted under a state court action, which is currently on appeal.

The Ninth Circuit reversed the district court's dismissal of the tie-in claim, holding that Datagate's allegations were sufficient to meet the requirements of Fed. R. Civ. P. 8(a)(2). *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864 (9th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992).

Upon remand to the district court, HP filed a motion for summary judgment. The parties stipulated to (1) HP's market power in the tying product (software service) and (2) "that there was a substantial volume of commerce in the tied product (software service)." (ER 188). The petition argues that this amounts to a stipulation to two of the elements of a per se tying offense, leaving only the issue of whether HP imposed a tie-in.[3] But, as the Ninth Circuit opinion noted, at oral argument HP declined to concede that any tying arrangement it imposed affected a "not insubstantial" amount of commerce.[4] (Pet. App. at 6a).

After providing Datagate an opportunity for additional discovery, the district court, Judge Aguilar presiding, granted HP's motion, based on the conclusion that Datagate had to

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3. The third element of a *per se* tying offense is that the tie-in had an effect on a "not insubstantial" volume of commerce. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495-499 (1969), quoting *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6 (1958). Thus, a stipulation relating to the substantiality of the tied product market *as a whole*, as distinguished from the portion of the market that is actually foreclosed, does not relate to the specific terms of the third element of a *per se* tying offense.

4. This Court has affirmed the "substantiality" of a foreclosure of $60,800 in *United States v. Loew's, Inc.*, 371 U.S. 38, 49 (1962). As discussed in the Appellant's Brief at 21-22, the circuit courts and district courts have consistently held that foreclosures in the range of $50,000 to $100,000 are "not insubstantial." *See, e.g., Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1130 (6th Cir. 1981); *Moore v. James H. Matthews & Co.*, 550 F.2d 1207, 1216 (9th Cir. 1977).

present evidence that HP had imposed the tying arrangement on "more than one or a few isolated HP system users . . . ." (Pet. App. at 20a). The basis of the district court's conclusion was the "single purchaser" dictum from *Jefferson Parish*, 466 U.S. at 16.

On appeal from this grant of summary judgment, the Ninth Circuit reversed, rejecting HP's argument that "a tying arrangement affecting only a single purchaser is insubstantial as a matter of law." (Pet. App. at 7a). The Ninth Circuit panel concluded that this Court did not intend its "single purchaser" language in one sentence of dictum in *Jefferson Parish* to be a rule of general applicability in all *per se* tying cases, because such a general rule would lead to aberrant results. (Pet. App. at 7a-9a). Rejecting all of HP's other arguments, the Ninth Circuit reversed and remanded the case for further proceedings consistent with its opinion.

REASONS FOR DENYING THE WRIT

I.

THERE WAS ABUNDANT EVIDENCE THAT HP COERCED ROCKWELL INTO TWO DIFFERENT CONTRACTUAL AGREEMENTS THAT WERE AGAINST ROCKWELL'S ECONOMIC SELF-INTEREST AND PREFERENCE FOR SERVICE; THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THE RELEVANT LEGAL ISSUE.

Hewlett-Packard's first argument is that the Ninth Circuit's opinion in this case allowed a Section 1 case to be based on what the petition presents as "a buyer's mere acquiescence in purchasing the tied product in response to a seller's unilateral statement that it would otherwise withhold the tying product," contrary to this Court's holding in *Monsanto Co. v. Spray-Rite*

Serv. Corp., 465 U.S. 752. (Petition at 8). This argument is based on a flat misrepresentation of the facts in this case and a skewed analysis of decisions from two other circuits. When the relevant facts from the current case are correctly understood, it is quite clear that there was a coerced "agreement" in this case, and that the Ninth Circuit's opinion is in complete agreement with both *Monsanto* and the relevant opinions of other circuit courts.

The record below demonstrates that Rockwell had previously removed the contract for service and maintenance of the 1000 series minicomputers from HP and given it to Datagate, initially because Datagate offered significantly lower prices. (ER 98-99). This existing service contract between Rockwell and Datagate was worth about $100,000 per year to Datagate, (ER 168), and Rockwell was pleased with Datagate's service, (ER 101, 109).

Rockwell then became unhappy with HP's performance on another contract, for service of the 3000 series minicomputers, (ER 100), and Datagate asked Rockwell in mid-1985 if it could bid on this larger contract. (ER 108). Mr. Buckner's testimony indicates that Rockwell was very interested in giving this second contract to Datagate, to take advantage of Datagate's superior service and lower prices. (ER 98-101, 108-110, 111-112, 117, 123).

Rockwell's main concern[5] about giving the important 3000 series contract to Datagate was that HP would refuse to provide software service if it did not have the hardware service contract as well. (ER 110). Rockwell knew that HP's tying of the two services would "effectively preclude[ ] our consideration of any

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5. Although Rockwell was initially concerned about whether Datagate had personnel in Texas trained to service the 3000 series minicomputers, it later learned that Datagate did have such personnel. (ER 109, 123).

third-party maintenance on the computer system," because Rockwell "could not do without [HP's] software maintenance." (ER 117). Without functioning software, Rockwell's computers, and therefore its business, would be brought to a standstill.

Two HP employees, including HP's district manager for software maintenance, confirmed HP's tying policy to Mr. Buckner on three separate occasions. The third conversation occurred after one of these employees said that he would check with HP's headquarters in California to confirm the policy. Based on this information, Rockwell *removed* the existing 1000 series contract from Datagate and returned it to HP, and also renewed HP's service contract for the 3000 series, rather than exercise its preference for Datagate's lower prices and better service.[6]

The Ninth Circuit concluded that this evidence supports an inference "that HP's threats to some extent coerced Rockwell into making a purchase from HP it would not have made on the open market," noting that *Jefferson Parish* had stated that "the primary harm from tying arrangements is the impairment of competition on the merits in the market for the tied product." (Pet. App. at 12a). The petition, however, simply ignores this evidence and the Ninth Circuit's discussion, and instead tries to create the inaccurate impressions (1) that only the 3000 series contract was at issue and (2) that there is no basis to infer that Rockwell was coerced into its renewal of this single contract with HP.

The evidence omitted from the petition demonstrates that

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6. Datagate did not offer evidence of the value of the 3000 series contract, in part because the $100,000 value of the 1000 series contract alone was sufficient to establish a foreclosure of a "not insubstantial" volume of commerce, as measured in all prior trying cases. *See* note 4, *supra*.

the Ninth Circuit's decision below is completely consistent with *Monsanto*'s concerns that mere "acquiescence" to a unilateral demand is not sufficient, by itself, to establish an inference of concerted action, and that there must be evidence that tends to exclude the possibility of independent action. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 764. Both of those requirements are clearly met in this case. Rockwell was forced to reverse a decision it had made in favor of Datagate only a few months earlier, and to award two contracts against its own economic and service-based interests.

In view of the abundant evidence of HP's coercion of Rockwell, the petition's discussion of the Fourth Circuit's decision in *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680 (4th Cir. 1992) is inapposite. In that case, there was no evidence that the defendant had ever made the sale of its diagnostic software conditional upon the purchase of its repair services. Nor was there any evidence that the defendant had forced anyone to buy the tied product. (*Id.* at 686). In contrast, Datagate offered clear and undisputed evidence that HP had imposed a tie-in, and that this tying policy had coerced Rockwell into awarding two contracts on grounds that were contrary to Rockwell's financial and business self-interest.

City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992) also offers no support to HP's position. That case involved a natural gas supplier, Williams, who owned the only interstate pipeline serving the plaintiff cities. The plaintiff cities had "full requirements" contracts with Williams requiring them to purchase all their natural gas requirements from Williams, and requiring Williams to meet all of the cities' demands. Williams only transported its own gas over the pipeline. After applying for a federal permit to allow it to transport gas belonging to third party suppliers, Williams started a temporary program allowing

the plaintiff cities to purchase gas from third party suppliers and transport it over the pipeline. (*Id.* at 646, 650). For a period of time, Williams halted this temporary program and closed its pipeline to alternate suppliers, other than certain "approved third party suppliers." (*Id.* at 648). The cities sued for damages during the time period when Williams refused to allow its pipeline to be used for gas belonging to alternate suppliers, other than the "approved third party suppliers." The district court granted summary judgment for Williams on the grounds that there was no evidence of an agreement, and no evidence that Williams "forced" the plaintiff cities to buy natural gas from Williams. (*Id.* at 646, 650).

The Fourth Circuit affirmed, holding that the pipeline was not an "essential facility," and that the plaintiff cities had "reasonable access" to the pipeline even during the period of closure of the pipeline to suppliers other than the "approved third party suppliers." Because the plaintiff cities could purchase transported gas from *either* Williams or the approved third party suppliers, (*id.* at 648-649), there was no basis to assume that the cities had been coerced or forced into the sales contract with Williams. Therefore, this contract could not supply the element of an "agreement" under Section 1. (*Id.* at 650).

Even if *City of Chanute* were read as holding that a coerced sales contract for the tied product could not supply the element of a "contract [or] combination . . . in restraint of trade" under Section 1, that holding has been effectively overruled by this Court in its opinion in *Eastman Kodak*. In that opinion, this Court stated as follows:

> . . . Kodak contends that this practice [sale of Kodak spare parts only on condition that Kodak service be purchased] is only a unilateral refusal to deal, which does not

> violate the antitrust laws. [citation omitted]. *Assuming, arguendo, that Kodak's refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, its alleged sale of parts to third parties on condition that they buy service from Kodak is not.*

(*Eastman Kodak*, 112 S. Ct. at 2080, note 8) (emphasis added). This Court has also affirmed numerous cases involving a contract or agreement between the defendant and a coerced purchaser as the sole basis of Section 1 liability. *See, e.g., United States v. Loew's Inc.*, 371 U.S. 38 (1962); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 2-3 (1958); *International Salt Co. v. United States*, 332 U.S. 392 (1947).

In contrast to the *City of Chanute* case, there is abundant evidence that Rockwell was forced to return the 1000 series contract to HP and to award the 3000 series contract to HP, both decisions being contrary to Rockwell's experience of cheaper prices and good service from Datagate (on the existing 1000 series contract) and dissatisfactory service and higher prices from HP (on the 3000 series contract).

Thus, the Ninth Circuit's opinion in the current case is consistent with the Fourth Circuit's decision in *Service & Training, Inc.* and with the Tenth Circuit's decision in *City of Chanute*. All three of these circuit court decisions are also entirely consistent with this Court's opinion in *Monsanto*, and thus there is no conflict between the circuits justifying the grant of the petition in this case.

II.

THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THIS COURT'S "SINGLE PURCHASER" STATEMENT FROM *JEFFERSON PARISH* WAS DICTUM THAT APPLIED ONLY TO THE FACTS OF THAT CASE; THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THIS ISSUE.

HP next argues that the petition is justified because the Ninth Circuit erroneously determined that this Court's "single purchaser" statement from *Jefferson Parish* was based on the facts of that case, and did not represent a general rule or new requirement in a *per se* tying case. (Pet. App. at 8a-9a). The Ninth Circuit's analysis was the first *holding* by any court of appeals based upon this specific issue, and also represents the first thorough and thoughtful consideration of the issue by any federal court. Thus, there is no conflict in the circuits on this issue, and review by this Court may properly be postponed in order to determine whether other circuit courts choose to depart from the accurate analysis of the Ninth Circuit.

The three elements of a *per se* tying case were established by this Court in *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958) and *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969), and were recently affirmed in *Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S. 119 (1992).

These three cases, combined with *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 1 (1984), represent a clear and consistent determination by this Court that a tying arrangement presents a sufficient probability of anticompetitive effect to justify *per se* treatment and a federal forum, provided that three factors are present: (1) a tie-in between two separate products,

(2) sufficient market power in the tied product to *coerce* or *force* the tying arrangement, and (3) foreclosure of a substantial volume of commerce.

The second and third of these requirements, unique to tying arrangements as opposed to other Section 1 offenses, are the two additional "screens" that this Court has imposed on tying litigation under Section 1 to ensure that only tying cases containing a "substantial potential for impact on competition" receive *per se* analysis. (*Jefferson Parish*, 466 U.S. at 15-16; *accord Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 794-797). It is the potential for foreclosure of competition on the merits in the tied product, and extension of market power from the tying product market into the tied product market that provide the probable anticompetitive effects of tying arrangements that meet the three established requirements. *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 794-795. *See also, Eastman Kodak*, 112 S. Ct. at 2093, dissenting opinion of Scalia, J.; *Jefferson Parish*, 466 U.S. at 14-15.

In his dissenting opinion in *Eastman Kodak*, Justice Scalia noted that, when the three components of a *per se* tying offense are present, anticompetitive effect is presumed "without *any* inquiry into the practice's actual effect on competition and consumer welfare." *Eastman Kodak*, 112 S. Ct. at 2093, dissenting opinion of Scalia, J. (emphasis in original).

In contrast to the well-established and consistent body of case law setting forth the required elements and rationale for *per se* tying treatment, HP now argues that this Court intended in *Jefferson Parish* to establish a third and additional "screen" for *per se* tying cases, supposedly in order to ensure that there is a "substantial potential for impact on competition" from such cases. HP's proposed third "screen" is a requirement that the tie-in be imposed on more than a "single purchaser" in order to qualify for *per se* treatment.

Logic alone is enough to demonstrate the fallacy of HP's argument: the proposed additional "screen" simply does not fulfill the function that supposedly serves as its justification. A "single purchaser" in modern commercial markets can easily involve tens of millions of dollars in commerce, and thus the proposed rule will screen out tying arrangements that clearly *do* involve a "substantial potential for impact on competition." Conversely, the proposed additional rule would, by itself, allow very small transactions involving two or more purchasers to receive *per se* treatment. These "aberrant results" are the primary reason that the Ninth Circuit declined to interpret the "single purchaser" statement from *Jefferson Parish* as being a fourth element of a *per se* tying case. (Pet. App. at 8a-9a).

In fact, the proposed rule would achieve its stated end *only* to the extent that it achieved results that were co-extensive with the results achieved by the "substantial volume of commerce" requirement. Therefore, HP's proposed "screen" would serve no logical purpose *not already served* by the "substantial volume" requirement, and would be an unnecessary and harmful addition to tying analysis, often achieving results contrary to the purposes of the two current "screens" for *per se* treatment of tying cases.

The petition also frequently assumes that the proposed "single purchaser" rule is logical because it would somehow correlate to size of market share.[7] First, this argument is contrary to the strong language in *Fortner I* stating that market share is not

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7. The petition states at several points that the Rockwell contracts represented only "about 0.015% of the alleged tied product market," or some similar figure. (*See, e.g.*, Petition at 5, 26). That figure is without support in the record. It is based on the assumption that the relevant market was for service of *all* HP hardware. (Petition at 4, note 2). In fact, the relevant market was the much smaller market for service of HP minicomputers. (ER at 188). There is no record evidence of the size of this specific market.

a relevant consideration for purposes of *per se* tying analysis. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501 (1969). In addition, HP's argument on this point fails because simple logic indicates that a single purchaser can often have a quite large share of the relevant market, and multiple purchasers can often have a quite small market share. Once again, the proposed rule would often fail to achieve its supposed purpose, even assuming that purpose were relevant.

Finally, HP asserts that if the tying arrangement is imposed on only one purchaser, "there is no potential for 'significant' increase in the defendant's power over the tied product or impairment of 'competition on the merits' in the tied product market." (Petition at 20). That assumption would often not be true, as shown by the facts of the current case, where HP's well-timed imposition of a tying arrangement significantly delayed Datagate's expansion into the central Texas market, and Rockwell was forced to accept services from HP that Rockwell found both too expensive and unsatisfactory.

Nor is HP accurate in stating that the Second and Eighth Circuits have issued post-*Jefferson Parish* decisions with holdings contrary to the Ninth Circuit's opinion in the current case. *Gonzalez v. St. Margaret's Housing Development Corp.*, 880 F.2d 1514 (2d Cir. 1989) involved a suit by a large number of tenants in a nonprofit housing facility, claiming that the facility's requirement that they purchase one meal a day at the facility constituted an illegal tying arrangement. The opinion contains only a bare repetition of the relevant language from *Jefferson Parish*, not a holding or even a discussion of its meaning. Even if the opinion did contain a purported holding as to the meaning of the "single purchaser" statement, however, such a holding would be pure dictum in that case, because the meal-purchase plan was imposed on all tenants of the housing project, and the case thus involved multiple purchaser plaintiffs. (*Id.* at 1518-1519).

Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215 (8th Cir. 1987) is also inapplicable. Ryko was a manufacturer of automatic car-wash equipment, and Eden was one of Ryko's distributors, under a contract that prohibited Eden from selling competitive equipment. Ryko sued Eden, claiming Eden had violated its distributorship contract, and Eden cross-claimed for antitrust violations, among other things. Eden made a tying claim based on a letter from Ryko that the court of appeal found did nothing more than attempt to enforce Eden's obligations under the exclusive dealing provisions of the contract. (*Id.* at 1235). The opinion contains only a bare repetition of the relevant language from *Jefferson Parish*, and never discusses the meaning of this passage or bases any holding upon it. (*Id.* at 1236).

HP cites no other post-*Jefferson Parish* circuit court opinion reaching a holding on the meaning of the relevant language from *Jefferson Parish*, and Datagate is aware of none. Thus, the Ninth Circuit's opinion in this case is the first circuit court opinion to reach the relevant legal issue, and is also the first court to engage in a reasoned discussion of the legal issue. There is no conflict in the circuits justifying the grant of the petition.

III.

THIS COURT HAS RECENTLY AFFIRMED *PER SE* TREATMENT FOR TYING ARRANGEMENTS, AND THE CURRENT CASE WOULD BE A POOR FACTUAL CONTEXT FOR REEXAMINATION OF THAT RULE.

HP finally urges this Court to re-examine the application of *per se* analysis to tying cases in general. But HP ignores the fact that this Court affirmed *per se* treatment of tying cases only recently in *Eastman Kodak*. Even the dissenting opinion in that case was based upon an affirmation of *per se* analysis for tying cases, in the proper factual context. The *Eastman Kodak* opinion is based on nearly fifty years of jurisprudence affirming this rule: *see, e.g., International Salt Co. v. United States*, 332 U.S. 392 (1947); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 2-3 (1958); *United States v. Loew's Inc.*, 371 U.S. 38 (1962); and *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

Even if this Court were inclined to re-examine *per se* treatment of tying cases, however, the current case would provide a poor factual context for this reconsideration. First, the current petition is based on the Ninth Circuit's reversal of a summary judgment, and thus there is no substantive trial record showing how the tying agreement impacted the plaintiff, the effects upon the market for the tied product, or the impacts upon the third party upon whom the tie-in was imposed (Rockwell).

Second, the current case would provide no record or facts upon which to base a discussion of any possible pro-competitive aspects of tying arrangements, since the tie-in imposed by HP had absolutely no procompetitive justification, and HP made no attempt to offer such a justification before the trial court. HP had a virtual monopoly in the tying product (software service for HP minicomputers) that was extended into the highly competitive

market for the tied product (hardware support). The tie-in was a bald-faced anticompetitive act. Datagate was temporarily foreclosed from entering a new market and suffered the loss of two quite substantial contracts. And finally, Rockwell was coerced into giving two significant service contracts to HP, at higher costs and lower quality of service than could have been obtained from Datagate.

Thus, the current case is a classic situation for application of the *per se* rule, and there is nothing pro-competitive about the illegal tying arrangement imposed by HP. This is not the factual context for a consideration of the possible pro-competitive effects of tying arrangements. The petition should be denied.

CONCLUSION

For all of the foregoing reasons, respondent Datagate, Inc. respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

FRANCIS O. SCARPULLA
Counsel of Record
LAW OFFICES OF
FRANCIS O. SCARPULLA
The Alcoa Building
1 Maritime Plaza, Suite 1040
San Francisco, CA 94111
(415) 788-7210

W. RUEL WALKER
LAW OFFICES OF RUEL WALKER
44 Montgomery, Suite 2500
San Francisco, CA 94104
(415) 397-1578

Attorneys for Respondents